Sumbangan Aneka Sdn Bhd v KNK Development Sdn Bhd & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-64-08 OF 2019 (Q)
ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA) AND RHODZARIAH BUJANG FCJ
26 APRIL 2021

Contract — Breach — Declaration — Whether fact that plaintiff's cause of action against defendant was for damages for breach of contract did not preclude plaintiff from also asking for declaratory relief — Whether court had full jurisdiction and power to grant declaratory relief in any given case except where party had sought a declaration alone without also seeking other relief that it was entitled to on the facts — Proviso to s 41 of Specific Relief Act 1950 — Whether clear mistake in phraseology in a document central to a litigation did not always require correction by way of application for formal rectification if error was easily curable by way of court's construction of the contract based on the conduct of the parties — Whether such correction was feasible if reading of the contract with the error made no commercial sense but created an absurdity instead — Whether where time was of essence of the contract promisor's failure to perform by agreed date entitled innocent party to terminate the contract — Contracts Act 1950 s 56(1)

The appellant owner of a piece of land entered into a development agreement ('DA') with the first respondent developer ('KNK') to develop the land with commercial and residential buildings. The second and third respondents, who were directors and shareholders of KNK, guaranteed KNK's performance of the DA under which, inter alia, KNK was required to build a certain number of residential and commercial units for the appellant ('the appellant's entitlements') within a certain timeframe. If the construction was not completed within that timeframe, the appellant agreed to grant KNK an extension of six months to ready the buildings subject to KNK paying liquidated and ascertained damages ('LAD'). If, at the end of the extended period, KNK still had not completed the buildings, the appellant was allowed to terminate the DA and to forfeit all improvement work that had been done on the land by KNK as LAD The DA was subsequently superseded by a supplemental agreement ('SA') between the parties which fixed a new completion date for the appellant's entitlements, namely, 20 August 2016. The SA provided that if KNK did not complete the construction by that date and 'unless time was extended by the Developer', the appellant was entitled to terminate the DA, forfeit all improvement works that had been done on the land as agreed LAD and be entitled to the benefits of all sale and purchase agreements that KNK had entered into with third-party buyers of properties

A that it had built on the land. As the completion date neared, KNK applied for two extensions of time from the appellant but both were rejected. The appellant subsequently gave KNK notice that it intended to re-enter and take possession of the land. The appellant then sued the respondents in the High Court for a declaration that the DA had expired or been terminated on B 22 August 2016 and that the appellant was entitled to enter into and take possession of the land with all the improvements that KNK had made thereon. The respondents counterclaimed that the termination was wrongful and sought damages amounting to RM20,647,820. The High Court gave judgment for the appellant and dismissed the counterclaim. Apart from C granting the declaration that was sought, the High Court ordered the respondents to pay the appellant various amounts by way of damages. The High Court also ruled that: (a) the appellant was entitled to terminate the DA and the power to terminate was exercised when it gave notice of intention to re-enter upon the land; (b) the phrase 'unless time was extended by the D Developer' in the SA was a typographical error as it made no commercial sense (rather, it was absurdity) if KNK could extend the completion date on its own indefinitely; and (c) only the appellant could grant KNK any extension of time for completion and such a finding was fortified by the very fact that KNK had itself applied twice to the appellant for extensions of time. The Court of Appeal E ('COA') reversed the High Court's decision, holding that: (i) the aforesaid 'error' could not be construed as merely typographical and curable by oral amendment as it afforded a 'substantive defence' to the respondents and therefore required correction by way of a formal application for rectification; (ii) the High Court should not have granted a declaration when the appellant's F claim was for damages for breach of contract. In the instant appeal against the COA's decision, the leave questions posed were: (A) whether the fact that the appellant's pleaded case was based on a breach of contract precluded it from seeking a declaration that the contract had been terminated; and (B) whether the aforesaid 'error' could only be rectified by way of a separate action/suit and G not corrected by the court through the process of interpretation of the contract in the course of the trial.

Held, unanimously allowing the appeal, answering the leave questions in the negative and reinstating the decision of the High Court:

H

(1) The existence of a statutory remedy was no bar to an action for a declaration. The general principle was that the jurisdiction of the High Court could not be taken away without express words and this included an action for a declaration. All that a declaration did was to declare the I rights of parties and such discretionary relief was available even where the cause of action lay in contract (see paras 18–19).

(2) The proviso to s 41 of the Specific Relief Act 1950 did not have the effect suggested by the respondents that since the appellant had pleaded breach of contract as its cause of action, the declaratory order sought was

obsolete and superfluous as it was meant to be granted only in the last resort when there was no other remedy available. In actual fact, the said proviso clearly provided that if a plaintiff who was able to seek for further relief other than a mere declaration failed to do so, the court could not grant him that declaration. In the instant case, the appellant sought not just the declaratory order but damages for breach of contract which it was entitled to once that declaration was made and by virtue of the aforesaid proviso, it would have been to the appellant's detriment if it had failed to ask for damages arising from that breach (see paras 24–26).

(3) The phrase in the SA stating 'unless time was extended by the developer' was a clear mistake which made for commercial absurdity if the power to extend time was left in the hands of KNK. Applying the legal maxim *falsa demonstratio non nocet*, KNK's conduct in applying for extension of time from the appellant was added justification favouring the appellant to say that the mistake was not just mutual but clear as well (see para 33).

(4) It was obvious from the existence of cl 1.1 of the SA and the conduct of the appellant in flatly refusing an extension of the time prescribed thereunder that time was of the essence of the contract. Section 56(1) of the Contracts Act 1950 therefore applied to make the contract between the parties voidable. The appellant, being the innocent party, had the option to terminate the contract. Since the agreements in the instant case did not stipulate the mode of termination, the High Court rightly held that the appellant's notice to re-enter the land was good enough to serve that purpose and, consequently, the said termination was lawful (see para 38).

[Bahasa Malaysia summary

Perayu merupakan pemilik tanah yang telah memasukki satu perjanjian pemajuan ('DA') dengan responden pertama yang merupakan pemaju ('KNK') untuk memajukan tanah tersebut dengan bangunan kediaman dan komersil. Responden kedua dan ketiga, merupakan pengarah dan pemegang saham KNK, menjamin pelaksanaan KNK dibawah DA, antara lain, KNK dikehendaki untuk membina sejumlah bangunan kediaman dan komersil untuk perayu (hak perayu) dalam tempoh masa yang ditetapkan. Sekiranya pembinaan tidak diselesaikan dalam tempoh masa tersebut, perayu bersetuju untuk memberikan lanjutan masa selama enam bulan untuk menyiapkan bangunan tersebut tertakluk kepada KNK membayar ganti rugi yang ditentukan dan tertentu (LAD). Sekiranya di akhir tempoh lanjutan masa, KNK masih belum menyelesaikan bangunan tersebut, perayu juga dibenarkan untuk membatalkan DA dan melucuthakkan semua kerja penambahbaikkan yang telah dilakukan pada tanah tersebut oleh KNK sebagai LAD. DA kemudiannya telah didahului oleh satu perjanjian tambahan (SA) antara pihak-pihak yang menetapkan Tarikh penyelesaian baru pada 20 Ogos 2016. SA memperuntukkan sekiranya KNK tidak menyelesaikan pembangunan

pada Tarikh dan 'sekiranya masa dilanjutkan oleh pemaju', perayu berhak untuk membatalkan DA, melucuthakkan semua kerja penambahbaikan yang dilakukan pada tanah tersebut seperti dipersetujui LAD dan berhak kepada semua hasil semua perjanjian jual beli yang KNK telah dimasukki dengan pihak ketiga pembeli hartanah yang telah dibina atas tanah tersebut. Menjelang tarikh penyelesaian, KNK memohon untuk dua pelanjutan masa dari perayu dan kedua-duanya ditolak. Perayu kemudiannya memberikan KNK notis bahawa ianya berniat untuk memasukki semula dan mengambil milikan tanah tersebut. Perayu kemudiannya menyaman responden di Mahkamah Tinggi untuk satu pengisytiharan bahawa DA telah luput atau telah ditamatkan pada 22 Ogos 2016 dan perayu berhak untuk masuk dan megambil milikan tanah dengan semua penambahbaikan yang telah dilakukan oleh KNK. Responden membuat tuntutan balas bahawa penamatan tersebut adalah salah dan memohon ganti rugi berjumlah RM20,647,820. Mahkamah Tinggi memberikan penghakiman yang memihak kepada perayu dan menolak tuntutan balas. Selain daripada membenarkan pengisytiharan yang dipohon, Mahkamah Tinggi memerintahkan responden untuk membayar perayu pelbagai jumlah dalam bentuk ganti rugi. Mahkamah Tinggi turut memutuskan bahawa: (a) perayu berhak untuk membatalkan DA dan kuasa unutk membatalkan dilaksanakan apabila ianya memberi notis akan niatnya untuk memasukki semula tanah tersebut; (b) frasa 'kecuali masa dilanjutkan oleh pemaju' dalam SA merupakan satu kesilapan pengkeranian kerana ianya tidak masuk akal secara komersil (malah ianya adalah tidak munasabah) sekiranya KNK boleh melanjutkan tarikh penyelesaian dengan sendirinya bagi tempoh masa yang tidak pasti; dan (c) hanya perayu boleh memberikan KNK apa-apa pelanjutan masa untuk pelaksanaan dan dapatan tersebut disokong oleh fakta bahawa KNK sendiri telah dengan sendirinya memohon selama dua kali kepada perayu untuk pelanjutan masa. Mahkamah Rayuan menerbalikkan keputusan Mahkamah Tinggi dan membuat dapatan bahawa: (i) kesilapan yang dikatakan tidak boleh dinyatakan sebagai satu kesilapan pengkeranian dan dipulihkan dengan pindaan lisan kerana ianya memberikan satu pembelaan substantif kepada responden dan oleh yang demikian memerlukan pembetulan melalui satu permohonan formal untuk pembetulan; dan (ii) Mahkamah Tinggi tidak sepatutunya membenarkan deklarasi apabila tuntutan perayu adalah untuk ganti rugi untuk pelanggaran kontrak. Dalam rayuan ini, terhadap keputusan Mahkamah Rayuan, soalan untuk izin merayu yang dikemukakan adalah: (A) sama ada fakta bahawa kes yang diplidkan oleh perayu adalah berdasarkan pelanggaran kontrak menghalangnya daripada mendapatkan satu deklarasi bahawa kontrak tersebut telah ditamatkan; dan (B) sama ada kekhilafan tersebut boleh dipulihkan dengan cara satu guaman/tindakan laindan tidak dibetulkan oleh mahkamah melalui proses tafsiran kontrak dalam perjalanan perbicaraan.

Diputuskan, sebulat suara membenarkan rayuan, menjawab soalan izin secara negatif dan mengekalkan keputusan Mahkamah Tinggi:

(1) Kewujudan remedi statutori bukan satu penghalan untuk satu tindakan untuk pengisytiharan. Prinsip umum adalah bidangkuasa Mahkamah Tinggi tidak boleh diambil tanpa perkataan lisan dan ini termasuklah satu tindakan untuk satu pengisytiharan. Apa yang dilakukan oleh pengisytiharan adalah untuk mengisytiharkan hak pihak-pihak dan merupakan satu relif budi bicara yang wujud walaupun kausa tindakan adalah dalam kontrak (lihat perenggan 18–19).

(2) Proviso kepada s 41 Akta Relif Spesifik 1950 tidak memberi kesan seperti yang dicadangkan oleh responden sejak perayu telah memplidkan satu pelanggaran kontrak sebagai kausa tindakanya, perintah pengisytiharan yang dipohon adalah usang dan tidak diperlukan kerana ianya bertujuan untuk hanya diberikan sebagai pilihan terakhir apabila tiada remedi lain yang wujud. Sebenarnya, provisio tersebut secara jelas memperuntukkan bahawa sekiranya seorang plaintif boleh memohon untuk mendapatkan relif lanjut selain daripada satu deklarasi gagal untuk berbuat sedemikian, mahkamah tidak boleh memberikannya deklarasi tersebut. Dalam kes ini, perayu memohon bukan sahaja perintah pengisytiharan tersebut tetapi juga ganti rugi untuk pelanggaran kontak yang mana ianya berhak untuk menerima sejurus selepas pengisytiharan tersebut dibuat dan berdasarkan proviso yang dinyatakan, ianya akan merugikan perayu sekiranya ianay gagal untuk memohon untuk ganti rugi yang timbul daripada pelanggaran tersebut (lihat perenggan 24–26).

(3) Frasa dalam SA menyatakan 'kecuali masa dilanjutkan oleh pemaju' merupakan satu kesilapan yang jelas yang mewujudkan keadaan tidak masuk akal komersil sekiranya kuasa untuk melanjutkan masa diletakkan di tangan KNK. Mengguna pakai maxim undang-undang *falsa demonstratio non nocent*, kelakuan KNK dalam memohon untuk pelanjutan masa daripada prayu merupakan alasan tambahan yang memihak kepada perayu untuk menyatkaan bahawa kesilapan tersebut bukan sahaja pada kedua-dua pihak tetapi juga adalah jelas (lihat perenggan 33).

(4) Adalah jelas dari wujudan klausa 1.1 SA dan kelakuan perayu dalam menolak pelanjutan masa yang diperuntukan bahwa masa adalah penting kepada kontrak. Seksyen 56(1) Akta Kontrak 1950 adalah diguna pakai kepada kontrak antara pihak-pihak untuk menjadikan kontrak tersebut boleh dibatalkan. Perayu, yang merupakan pihak tidak bersalah, mempunyai pilihan untuk menamatkan kontrak tersebut. Memandangkan perjanjian dalam kes ini tidak menetapkan cara penamatan, Mahkamah Tinggi telah dengan betul memutuskan bahwa notis perayu untuk memasukki semula tanah adalah memadai untuk mencapai matlamat tersebut dan sebagai kesan, penamatan tersebut adalah sah disisi undang-undang (lihat perenggan 38).]

Cases referred to

Abram Steamship Company, Limited (in liquidation) and another v Westville Shipping Company, Limited (in liquidation) and another [1923] AC 773, HL (refd)

Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd [1958] 1 All ER 725, HL (refd)

Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Co (M) Bhd [2015] 6 MLJ 223; [2015] 9 CLJ 821, CA (refd)

Amalan Tepat Sdn Bhd v Panflex Sdn Bhd [2011] 5 MLJ 512; [2011] 7 CLJ 121, FC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Chartbrook Ltd v Persimmon Homes Ltd and another [2009] 4 All ER 677, HL (refd)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464; [2011] 9 CLJ 257, FC (refd)

Dumford Trading AG v OAO Atlantrybflot [2005] EWCA Civ 24, CA (refd)

Hardwick v Hardwick (1873) LR 16 Eq 168 (refd)

Investors Compensation Scheme Ltd v West Bromwich Building Society; Investors Compensation Scheme Ltd v Hopkin & Sons (a firm) and others; Alford v West Bromwich Building Society and others; Armitage v West Bromwich Building Society and others [1998] 1 All ER 98, HL (refd)

Juara Serata Sdn Bhd v Alpharich Sdn Bhd [2015] 6 MLJ 773, FC (refd)

Menta Construction Sdn Bhd v Lestari Puchong Sdn Bhd [2015] 6 MLJ 633; [2015] 8 CLJ 1117, FC (refd)

Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337, FC (refd)

Ng Siew Wah & Ors v MAA Holdings Sdn Bhd & Anor [1985] 2 MLJ 332, SC (refd)

Nittan (UK) Ltd v Solent Steel Fabrication Ltd (t/a Sargrove Automation and Cornhill Insurance Co Ltd) [1981] 1 Lloyd's Rep 633 (refd)

Noor Azman bin Azemi v Zahida bt Mohamed Rafik [2019] 3 MLJ 141, FC (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)

Paramaha Enterprise Sdn Bhd & Ors v The Government of the State of Sabah & Anor [2015] MLJU 2132; [2015] 2 CLJ 268, CA (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25; [2011] 1 CLJ 51, FC (refd)

Tiarasetia Sdn Bhd v Yayasan Selangor & Anor [2012] 1 LNS 1019, CA (refd)

Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 WLR 601, HL (refd)

Zulkiflee bin Abdul Samad v Segi Objektif (M) Sdn Bhd [2016] MLJU 1333; [2016] 1 LNS 1488, CA (refd)
Hungerford Investment Trust Limited (in voluntary) v Haridas Mundhra & Others 1972 AIR 1826, SC (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)

Legislation referred to

Contracts Act 1950 ss 40, 56(1)
Courts of Judicature Act 1964 ss 25, 78, 96(a)
Rules of Court 2012 O 15 r 16
Specific Relief Act 1950 ss 30, 41

Appeal from: Civil Appeal No Q-02(NCVC)(W)-1525–07 of 2017 (Court of Appeal, Putrajaya)

Frank KH Tang (Leong Hsin Ru and John Sim with him) (Tang & Partners) for the appellant.
Clement Wong Tech Hoo (Then Siaw Lian with him) (Clement & Company) for the respondents.

Rhodzariah Bujang FCJ:

[1] At all material times of this appeal, the appellant was the registered proprietor of a parcel of land described as Lot 532, Block 9, Bukar-Sadong Land District whilst the first respondent, was a developer. On 18 October 2012, both parties entered into an agreement to develop the land for both commercial and residential purposes ('development agreement'), which agreement was supplemented ('the supplemental agreement') about two years later on 24 September 2014. Pursuant to an agreement executed on the same date as the development agreement, the second and third respondents who were directors and shareholders of the first respondent agreed to guarantee the first respondent's performance of the development agreement ('performance guarantee'). An irrevocable power of attorney ('the first PA') in favour of the first respondent valid for the duration of the development agreement was granted by the appellant to give it power, on behalf of the plaintiff, to do what were necessary to implement the development of the land as provided in cll 1–18 thereof. A supplemental power of attorney ('second PA') was also executed following the execution of the supplemental agreement. At the time when the said agreements and instruments were executed, the said land was charged to Public Bank. Irresolvable disputes arose between the parties in the implementation of the said agreements which led to the filing of the suit by the appellant in the High Court for, inter alia, a declaration that the development agreement had expired on 22 August 2016, that it was terminated on the said date and that the appellant would enter and take possession of the land with all

A the improvements. The respondents, on the other hand, counterclaimed, inter alia, for a declaration that there was wrongful termination of the development agreements and for monetary losses amounting to RM20,647,820. The suit ended in victory for the appellant but that decision was reversed by the Court of Appeal upon a successful appeal by the respondents. On 26 July 2019, this B court granted the appellant leave to appeal against the aforesaid decision on these two questions:

(i) Where the plaintiff's pleaded case is based on a breach of contract, is he barred from seeking a declaration of the court that the contract has been C terminated: and

(ii) Where there is an error in a document central to the case, does the party have to take up a separate action or separate suit for rectification, or can the court correct the error through the process of interpretation of the contract in the course of the trial.

D

[2] We would start our consideration and determination of the leave questions by first outlining the salient terms of the written agreements and the respective decisions of the courts below. In doing so and for the rest of our judgment, parties would be referred to as they were in the High Court.

E

ENTITLEMENTS IN THE AGREEMENT

[3] It is not disputed that the central issue which is at the heart of the legal squabble of the parties is whether, as alleged by the plaintiff, that the F development agreement had expired and/or lawfully terminated or was it as contended by the defendants, been brought to an unlawful end by the plaintiff's own repudiation of the same when it gave notice of intention to re-enter the land on 26 August 2016. That issue rests solely on the timelines provided in the supplemental agreement in respect of the plaintiff's G entitlement to both the residential and commercial units to be built on the land, which numbered 21 ('the plaintiff's entitlement'). That entitlement is governed by cl 12 of the development agreement which reads in full as follows:

12. COMPLETION OF THE LANDDOWNER'S ENTITLEMENTS

H 12.1 The Developer shall at its own cost and expense complete the construction of the Landowner's entitlements within a period of *Thirty Six (36) months* from the date on which the said amended building plan have been approved by the relevant authorities (hereinafter called *'the said completion date*'). 'Completion' shall mean when the appointed Architect has certified the completion of the buildings in accordance with the approved building plan and specifications by issuing the I Certificate of Practical Completion of the building(s).

12.2 If the Developer shall fail to physically complete the Landowner's entitlements on or before the completion date, the Landowner shall upon request by the Developer grant the Developer a grace period of SIX (6) months to complete the same provided that the Developer shall be liable to pay the Landowner agreed

pre-estimated liquidated damages of *Ringgit Malaysia Five Hundred Only (RM500.00) per month for each of the Landowner's entitlements in respect of the residential houses and Ringgit Malaysia One Thousand Only (RM1,000.00) per month each for the commercial shophouses* as long as they remain incomplete. The agreed pre-estimated liquidated damages shall be paid by the Developer to the Landowner on the last day of each month of the said grace period. *if the Developer shall fail to complete any of the Landowner's entitlements upon the expiration of this grace period, the Landowner shall be entitled to terminate this agreement, and it is hereby agreed that the Landowner shall be entitled to forfeit all the improvement work that may have been done by the Developer on the said Land as agreed pre-estimated liquidated damages and thereafter neither parties shall have any claim against one another.* (Emphasis added.)

[4] The building plan mentioned in cl 12.1 was approved on 21 February 2013. In the supplemental agreement the clause on the above mentioned entitlement is cl 1.1. This all-important clause defining the obligation of the first defendant with respect to the plaintiff's entitlements, is reproduced below with cl 1 for completeness and they read as follow:

1. In consideration of the Landowner agreeing to grant a Supplemental Power of Attorney deleting the 36 months time frame in the Power of Attorney vide Intrument No. L8080/2012, the Landowner and the Developer hereby agrees to the following:

1.1 In the event that the Developer fails to complete the landowner's entitlements *on or before 20 August 2016* (unless time extended by the *Developer*), the Landowner shall:

(a) Terminate the Development Agreement, whereby

(i) The Landowner shall forfeit all improvement(s) works done on the said Land; and

(ii) For all units sold by the Developer, the rights pertaining to the Sale and Purchase Agreement(s) between the Developer and the buyers shall be assigned to the Landowner. For purpose of this sub-clause, upon the execution of this Supplementary Agreement, the Developer shall execute a Novation Agreement (in escrow) for all the Sale and Purchase Agreements(s) between the Developer and respective buyers. Novation Agreement (in ecrow) shall be deposited with the Landowner's solicitors and only to be dated and stamped if the Development Agreement is terminated. For any units to be sold by the Developer after the date of this Supplemental Agreement, the Developer shall execute a Novation Agreement in escrow and deposited with the Landowner's solicitors; and

(A copy of the Novation Agreement is annexed and marked 'A')

(i) All Novation Agreement shall be returned to the Developer by the Landowner's solicitors upon all the Landowner's entitlements have been delivered to the Landowner; and

(ii) The said Land shall be returned to the Landowner; and

A

(iii) The Landowner shall continue in the construction and development of the said Land, in which all proceed thereafter shall belong to the Landowner; and

(iv) The Landowner may claim against the Developer for any losses arising from the failure to complete the Development. (Emphasis added.)

B

[5] As noted by the learned judicial commissioner (as she then was), the plaintiff's entitlement was not completed by the 20 August 2016 as stipulated above. In fact the first defendant knew even before the aforesaid date that it was unable to meet the stipulated deadline and thus by a letter dated 7 December 2015 written on its behalf by their then solicitor, Messrs Thai Advocates, it requested in para 9 thereof for an extension of time, and that is worded in the following words:

C

D

9. Further, Clause 1.1 of the Supplemental Agreement stipulates that the time for completion may be extended by the Developer and thus forth, the developer reserved the right to extend the time to complete the Landowner's entitlements. The construction works on the Landowner's entitlements are in progress and despite the aforementioned shortcomings, the Developer has not neglected to proceed with construction works as envisaged under the Development Agreement.

E

Having said the above, *we would be much obliged if this matter can be resolved amicably and that the Landowner will graciously grant the Developer a further extension of time beyond 20.08.2016 in order for the Developer to complete the Landowner's entitlements*. (Emphasis added.)

F

[6] That application was rejected by the plaintiff's then solicitor, Messrs Sia, Alvin Wong and Partners in its letter dated *9 May 2016* wherein in para 8 thereof, it states as follows:

G

(8) Please be informed that the Grace Period for the completion of all Landowner's entitlement shall be on *20.8.2016*. Thereafter, the Landowner reserved its right under the Development Agreement and Supplemental Agreement.

[7] The first defendant continued its quest for that extension of time by penning another letter from its then solicitor dated *11 July 2016* with the reasons stated therein and coaching that quest in the following words but which request was again rejected by the plaintiff:

H

I

In view of the aforesaid, we trust both your client and your goodself are able to honour the terms of the supplementary agreement (previously drafted by your goodself) by agreeing IN WRITING the said extension required by our client due your client's undeniable delays throughout the course of this agreement.

TAKE NOTICE that should your client objects or fails to agree to the extension of time, our client shall take necessary action to claim for all losses and damages suffered.

[8] The above correspondences between solicitors acting for the parties actually also alluded to their respective client's reasons for the delay which, in view of the leave questions are not material to the outcome of this appeal. However for the sake of completeness, they would summarily be mentioned now. The first defendant contended, inter alia, that it was the plaintiff's failure to partially redeem the charge with the bank within 14 days from the receipt of the Notice of confirmation of sale from the first defendant as provided by cl 3.3 of the development agreement despite numerous reminders for it to do so and failing to grant an irrevocable PA within the time frame under cl 3.4 read with cl 9 of development agreement but instead giving it a life span of only 36 months. These failures contended the first defendant resulted in the end-financiers refusing to release progress payments to the first defendant which consequentially affected its ability to perform its obligations under the agreement. The plaintiff of course denied the said allegations and in answer to the redemption issue, it referred, inter alia, to the bank's letter of disclaimer confirming that the units under first defendant entitlement as stipulated in the said letter are free from any redemption amounts and were not subject to foreclosure proceedings. As for the PA issue, the plaintiff's answer was that the first defendant was represented by their own solicitor during negotiations leading to the execution of the development agreement, the PAs as well as the supplemental agreement.

JUDGMENT OF THE HIGH COURT

[9] The learned judicial commissioner framed the issues before her as follows:

(a) on who had the right to extend the completion date under the agreement;

(b) on the termination or expiry of the agreement; and

(c) on the loss and damages claimed by the plaintiff.

[10] For the first issue, the learned judicial commissioner found that the said cl 1.1 expressly retained the right of the plaintiff to terminate the agreement and given the said right, Her Ladyship said:

> ... it did not make any commercial or common sense at all that the right to extend the time for completion of the Plaintiff's Entitlements would be vested in the first defendant. If it were true, surely it would render the plaintiff's right mere illusory as the first defendant could always extend the time if they were unable to complete the Plaintiff's Entitlements by 20.8.2016? In facts, wouldn't such interpretation leave it open for the first defendant to extend the completion date indefinitely?

[11] Her Ladyship also alluded to the fact that the first defendant own advocate's letters dated 7 December 2015 and 11 July 2016, which we had

A referred to earlier, also requested for an extension of time which contradicted its own assertion that it need not do so as that decision was theirs to make. The word 'Developer' in the impugned phrase, concluded the learned judicial commissioner was a typographical error which error is not 'totally alien to contractual disputes', citing *Investors Compensation Scheme Ltd v West Bromwich Building Society; Investors Compensation Scheme Ltd v Hopkin & Sons (a firm) and others; Alford v West Bromwich Building Society and others; Armitage v West Bromwich Building Society and others* [1998] 1 All ER 98 and *Ng Siew Wah & Ors v MAA Holdings Sdn Bhd & Anor* [1985] 2 MLJ 332.

[12] In respect of the second issue, the learned judicial commissioner noted that cl 12.2 of the development agreement and cl 1.1 of the supplemental agreement vest the right to terminate the said agreements with the plaintiff though it did not include any terms specifying how such termination may be made or communicated. However, Her Ladyship found that the effect of the notice of intention to re-enter the land dated 26 August 2016 issued by the plaintiff was a termination of both the agreements since it had informed the first defendant that it was not agreeable to any further extension. That power to terminate, said Her Ladyship, had been validly exercised. As for the second and third defendants, upon the first defendant's failure to complete the plaintiff's entitlement within the prescribed time, they were not discharged from the guarantees executed by them. Thus, the learned judicial commissioner ordered the counterclaim of the defendants be dismissed.

[13] On the last issue, the learned judicial commissioner granted the following reliefs to the plaintiff:

(a) upon a declaration that the agreement had expired on 22 August 2016 and or had been terminated, the first defendant was ordered to pay the plaintiff a sum of RM17,442,330 being proceeds of sales of the first defendant's entitlements to third parties;

(b) that the first defendant is not entitled to the units of its entitlements as specified in the agreement;

(c) that the first, second and third defendant, jointly and severally, pay the plaintiff RM7,806,485.10 being the cost to complete the development on the land and pre-estimated liquidated damages under cl 12.2 of the agreement; and

(d) that the first defendant pay the plaintiff RM22,887.84 being the undisputed amount reimbursable under cl 2 of the development agreement.

[14] The learned judicial commissioner did not grant prayers (b) and (c) of the plaintiff's statement of claim which was for all sales of the first defendants

units to third parties under the agreement be assigned to the plaintiff or alternatively all such sales to be set aside as this would amount to a miscarriage of justice to purchasers of such units who were not parties to the action.

JUDGMENT OF THE COURT OF APPEAL

[15] In its judgment, the Court of Appeal allowed the appeal of the defendants premised on these grounds:

(a) the learned judicial commissioner erred in granting the aforesaid declaratory order because such order is a discretionary relief which falls under the Specific Relief Act 1950 whereas the plaintiff's claim is for reliefs pursuant to a breach of contract, which is a substantive right under the Contracts Act 1950. Such a declaratory order should not have been granted because the contract, in particular cl 1.1 which was in the first defendant's favour, was disputed in material forms. The alleged error in cl 1.1 should not be labelled as a typographical one and to be amended orally by looking at other documents and/or conduct of the parties which the learned judicial commissioner did. Instead, the mistake should first be rectified. Thus, the principles in *Ng Siew Wah*'s case do no not apply because the rectification of cl 1.1 is substantive in nature in that it anchors a substantive defence of the defendant; and

(b) the principle established in *Nittan (UK) Ltd v Solent Steel Fabrication Ltd (t/a Sargrove Automation and Cornhill Insurance Co Ltd)* [1981] 1 Lloyd's Rep 633 does not apply to the factual matrix of this case for the reasons as stated above.

[16] Our determination of the leave questions, would start with parties' submissions and for ease of reference these leave questions would be reproduced as headings in our judgment.

Where the plaintiff's pleaded case is based on a breach of contract, is he barred from seeking a declaration of the court that the contract has been terminated?

[17] Learned counsel for the plaintiff submitted that the judgment of the Court of Appeal is erroneous on these four grounds:

(a) the three cases it cited that is, *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2011] 5 MLJ 512; [2011] 7 CLJ 121, *Zulkiflee bin Abdul Samad v Segi Objektif (M) Sdn Bhd* [2016] MLJU 1333; [2016] 1 LNS 1488 and *Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Co (M) Bhd* [2015] 6 MLJ 223; [2015] 9 CLJ 821 do not support the grounds given for its decision not to grant declaratory judgment;

(b) it is a standalone judgment which conflicts with a line of previous Court of Appeal decisions;

(c) it conflicts with s 25 of the Courts of Judicature Act 1964 and O 15 r 16 Rules of Court 2012; and

(d) the Court of Appeal failed to appreciate that the nature of the declaratory judgment is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs.

[18] Although we would have to agree, after perusing the three cited cases in detail that their respective ratio is not about prohibiting the granting of a declaratory order for a breach of contract claim, but in fairness to the Court of Appeal, the said cases were cited, it would appear to us from the excerpts of the said judgments reproduced in its judgment, particularly in the first two cited cases, that it was to stress the point that a declaratory order is a discretionary relief and only to be granted when the conditions as stipulated in the respective judgments are met. Of course as listed in para 22 of learned counsel for the plaintiff's written submission, there is a number of Court of Appeal's decision where such a declaratory order had been granted when the claims were based on breach of contract (see, inter alia, *Tiarasetia Sdn Bhd v Yayasan Selangor & Anor* [2012] 1 LNS 1019 and *Paramaha Enterprise Sdn Bhd & Ors v The Government of the State of Sabah & Anor* [2015] MLJU 2132; [2015] 2 CLJ 268, both of which were also in respect of development agreements). There is therefore ample authority in support of the legal position canvassed by him and which we must say we fully endorsed. As rightly pointed out by the plaintiff's counsel, the stand of the court all these years, as held by Raja Azlan Shah Ag CJ (Malaya) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 is firstly, the existence of a statutory remedy is no bar to an action for a declaration, that the general principle is that the jurisdiction of the High Court is not to be taken away without express words and this includes an action for a declaration.

[19] Secondly, all that a declaration does is to declare the rights of the parties. The availability of this discretionary relief where the cause of action lies in contract, as pointed out by the plaintiff's counsel has been stressed in the following publications:

(a) the declaratory judgment by Zamir & Woolf where at para 1–02 it states that the court may declare that a contract to which the claimant is a party has or has not be determined;

(b) *Law of Contract* by Cheshire & Fifoot at p 583 where it states that a party who accepts the discharge of the contract by breach may fortify his position in this respect by taking up proceedings for a declaration that the contract is terminated; and

(c) *Equity, Doctrines & Remedies* by Meaghar, Gummow & Lehane at para 19–075 where it states that a declaration can be made that a breach of contract has occurred or that a contract has been terminated.

[20] In addition to the above authorities, we also noted that the House of Lords in *Abram Steamship Company, Limited (in liquidation) and another v Westville Shipping Company, Limited (in liquidation) and another* [1923] AC 773 had held that obtaining a verdict from the court to enforce a right to rescind a contract does not terminate the contract and restores the antecedent status for that verdict is merely a judicial determination that the plaintiff's election to rescind the contract was justified. This decision was followed by the Indian Supreme Court in *Hungerford Investment Trust Limited (in voluntary) v Haridas Mundhra & Others* 1972 AIR 1826 which held that:

> A court generally adjudicates upon the antecedent rights of the parties. When a Court adjudges rescission of a contract or a decree, it is only concerned with the question whether the person rescinding it was justified in doing so. The Court does not create any right which parties did not possess when it makes a declaration that a contract has been validly rescinded.

[21] Learned counsel for the defendants' primary stand is that the said leave questions are merely ancillary to the main issue which is whether the termination of the agreements was lawful and that the said questions are not based on the findings made by the Court Of Appeal. In respect of the first question, learned counsel submitted that the Court of Appeal only held that the declaratory relief sought is 'discretionary but should not be exercised if the plaintiff's claim is for breach of contract' but did not rule that the plaintiff is barred from seeking the said order, only that this was not a fit and proper case for doing so when it states in para 7 of its judgment as follows:

> [7] *The facts of this case will also show that the court should not have granted the declaratory prayers as the contract that the plaintiffs were relying on was disputed in material form in respect of a particular clause where it was in favour of the defendant* ... (Emphasis added.)

Therefore, submitted learned counsel further, we should not even have to answer the said leave question, citing this court decision's in *Noor Azman bin Azemi v Zahida bt Mohamed Rafik* [2019] 3 MLJ 141.

[22] We find it appropriate to pause now to mention that in respect of the second leave question, learned counsel did not advance any reason why it should not similarly be answered because after laying out the relevant facts and clauses in the supplemental agreement as well the pleadings on it and the judgments of the lower courts, learned counsel in para 54 of his written submission said this:

54. Be that as it may, we humbly submit that the real issue between the parties herein is whether the termination of the Development Agreement by the Plaintiff is lawful. The first and second Questions are merely ancillary to the real and main issue. Therefore, in order to achieve justice of this case, we will invite this Honourable Court to look into the real issue of the case, i.e. the legality of the termination by the Plaintiff. This case must be carefully and holistically examined as the outcome would indirectly affect the faith of 57 bona fide purchasers of the Development.

[23] We have, said learned counsel further, power to decide on this issue on the legality of the termination so as, in the words of Gopal Sri Ram JCA in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 at p 113, to do complete justice according to the substantial merits of a particular case and even to avoid miscarriage of justice as held in *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337. He also pointed out that deciding an appeal without answering leave questions which had been granted was even done in *Juara Serata Sdn Bhd v Alpharich Sdn Bhd* [2015] 6 MLJ 773.

[24] Nonetheless, for the sake of completeness, learned counsel did submit on the merits of the leave questions. In respect of the first question, he submitted that from the clear wordings of s 41 of the Specific Relief Act 1950 'it can be seen that the intention of a declaratory order is to cater for instances where no further relief or other relief can be sought for. It is not to supplement or support further reliefs like what was done by the Plaintiff in our case herein'. Therefore, he said, since the plaintiff had pleaded breach of contract as its cause of action, the declaratory order sought is obsolete and superfluous as it is meant to be the last resort when there is no other remedy.

[25] With due respect to learned counsel, we are not persuaded to depart from the view we expressed earlier on this first leave question based on the reasonings he gave above for we simply could not agree that is the effect of the said s 41. This is because the proviso to that section clearly provides that a plaintiff who is able to seek for further relief other than a mere declaration but did not do so disentitles the court from granting him that declaration. For the sake of clarity, that section reads:

41 Discretion of court as to declaration of status or right

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so. (Emphasis added.)

[26] The plaintiff before us was obviously seeking not just that declaratory order but damages for breach of contract which it was entitled to once that declaration is made and by virtue of the aforesaid proviso, it would be to its detriment if it failed to ask for damages arising from that breach. Thus, our answer to the first leave question is in the negative.

Where there is an error in a document central to the case, does the party have to take up a separate action or separate suit for rectification, or can the court correct the error through the process of interpretation of the contract in the course of the trial

[27] The court's power to correct a misnomer when construing a document was pronounced by the English Court of Appeal in *Nittan*'s case where Lord Denning MR held at p 637 as follows:

> In this Court we are very used to dealing with misnomers. We do not allow people to take advantage of a misnomer when everyone knows what was intended. I will only refer to one authority, *Whittam v WJ Daniel & Co Ltd* [1962] 1 QB 271 at p 277, where Lord Justice Donovan cited the words of Lord Justice Devlin:
>
> *I think that the test must be: how would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong', then there is a case of mere misnomer.* (Emphasis added.)

More pertinent to the case before us is what was said by Brightman LJ in the same case at p 639:

> In my opinion, in construing a document, the Court is at liberty, as a matter of construction, to correct a misnomer. *A misnomer is not, in my view, necessarily a mistake which requires the equitable remedy of rectification. The misnomer may be a mere clerical error. A simple example would be the use in a conveyance of the expression 'the vendor' where clearly 'the purchase purchaser' was intended.* It is not necessary to rectify the conveyance to enable it to be read and take effect as the parties plainly intended. (Emphasis added.)

[28] The above principle was applied by our Supreme Court in *Ng Siew Wah*'s case where Mohamed Azmi SCJ quoted with approval the above passage from Brightman LJ's judgment. With the greatest of respect to the Court of Appeal, its reasoning that the principle established in *Nittan*'s case does not apply to the factual matrix of this case because it is not a clear mistake, for the defendant's defence would collapsed if it were treated as such and that rectification in this case is substantive in nature and anchors the defence is simply erroneous. The obviousness of the mistake itself from the factual matrix of a case is the criteria. The dispute whether it is one or not, is not the consideration for as seen in the cases cited above and numerous others on the same issue, one of the parties to the proceedings was contending that is was not a mistake. In other words and to rephrase Lord Denning's words quoted above

A the principle consideration to be given is whether, that other party was trying to take advantage of the misnomer.

[29] Applying the principle in *Nittan*'s case, learned counsel for the plaintiff submitted that it is clear from cl 1.1 that the approving party being referred to
B is the landowner which, as found by the learned judicial commissioner is supported by the first defendant's own conduct at that material time in asking for extension of time from it. To say otherwise would, said learned counsel further, leads to commercial absurdity because the first defendant would then be able to indefinitely extend time to complete the plaintiff's units, thus
C rendering the completion date of 20 August 2016 meaningless.

[30] That submission of his has support from the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd and another* [2009] 4 All ER 677 when
D it opined as follows when the court construes whether the error is a misnomer:

> Although the courts did not readily accept that linguistic mistakes were made in formal contracts, *where the background and context drove the court to conclude that something had gone wrong with the language in a contract, the law did not require the court to attribute to the parties an intention which a reasonable person would not have*
E *understood them to have had. Where there was a clear mistake in the contract and it was clear what correction ought to be made in order to cure the mistake on the basis of what a reasonable person would have understood the parties to have meant, then the court was entitled to correct the mistake as a matter of construction.* (Emphasis added.)

F **[31]** Alternatively, submitted learned counsel further, the maxim of *falsa demonstratio non nocet* applies to correct the said error. It is a legal maxim which means that a false description does not void a document if the intent is clear and the mistake is obvious. This maxim had been applied by the English Courts in, inter alia, *Dumford Trading AG v OAO Atlantrybflot* [2005] EWCA
G Civ 24 and *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1958] 1 All ER 725. In applying this maxim, the court is allowed to consider extrinsic facts to look at 'the whole thing fairly' to see 'what are leading words of description' said Lord Selborne LC in *Hardwick v Hardwick* (1873) LR 16 Eq 168.

H

[32] As for the learned counsel for the defendants, he submitted that the alleged error in cl 1.1 of the supplemental agreement is not a clear mistake or a typographical one as found by the Court of Appeal and therefore a separate action for rectification of the document is necessary. He referred to paras 4.1
I and 4.3 of the plaintiff's reply to the defence and defence to counterclaim where the plaintiff referred to the said alleged error as being occasioned by a 'mutual mistake' and that since it was not a clear error, as decided by this court in *Menta Construction Sdn Bhd v Lestari Puchong Sdn Bhd* [2015] 6 MLJ 633; [2015] 8 CLJ 1117 it cannot be corrected by way of construction of the

document but by rectification. This, submitted learned counsel further, is in line with the provision of s 30 of the Specific Relief Act 1950 which provides as follows:

> 30 When instrument may be rectified
>
> When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, *may institute a suit to have the instrument rectified: and if the court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.* (Emphasis added.)

[33] Obviously, from the clear wordings of the said section, the court is seized with jurisdiction to rectify such an instrument, which is the agreement in this case. The issue is whether such power must only be exercised in a specific suit or legal action for that purpose as decided by the Court of Appeal. Again, with much due respect to the Court of Appeal, we are unable to agree with that judicial stand because for one, that strict requirement is not stipulated in the said section as the word 'may' is used. Secondly, with due respect to learned counsel for the defendant, the fact that the error was labelled a 'mutual mistake' and not a clear mistake in the plaintiff's pleading, does not disentitle us to apply the principle in *Nittan*'s case for a mistake which is mutual is on an even, or we would even be prepared to say, a higher footing than a clear mistake which warrants a rectification by the court. A clear mistake that error is, for as rightly held by the learned judicial commissioner and submitted by learned counsel for the plaintiff, it makes for commercial absurdity to leave such a power in the hands of the developer. Applying the above mentioned the said legal maxim of *falsa demonstratio non nocet,* the conduct of the defendant in applying for the extension of time from the plaintiff is the added justification in favour of the plaintiff to say that the mistake was not just mutual but clear as well. Therefore, based on the considerations above, we would equally answer the second legal poser in the negative in favour of the plaintiff.

[34] However, learned counsel for the defendant submitted that our task does not end here because as we had stated earlier, he said in essence we have a corollary issue to determine if the termination of the agreement was lawful. He submitted that the plaintiff had no such right to terminate because there was no total failure of consideration given that 57 units had been completed and 21 units were in progress at that material time and besides the rights of bona fide purchasers would be affected by the termination. The learned judicial commissioner, said the defendant's counsel, had taken a simplistic approach by automatically allowing the termination on account of the non-extension of the six months grace period when there was not even a notice of termination issued

by the plaintiff. Learned counsel relied on this court's decision in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 where it was held, by referring to ss 40 and 56(1) of the Contracts Act 1950 that the right to rescind a contract by way of termination only arises when there has been a total failure of consideration. Otherwise, held this court, the innocent party could only claim damages. Learned counsel for the defendant however conceded that this issue of total failure of consideration was never submitted before the learned judicial commissioner and although it was in the Court of Appeal, the same was not considered by it.

[35] Learned counsel for the plaintiff took a strong objection against this proposed additional task because that issue does not fall within s 96(a) of the Courts of Judicature Act 1964. The court's power to deal with matters outside of the leave questions granted in order to do complete justice only arises, as provided in the said section, if the question to be answered by the court arose from the decision of the High Court exercising its original jurisdiction or from the decision of the Court of Appeal which has raised a question of law of general principle not previously decided by this court. Obviously, and we have no cause to disagree with him, this was not the case here. Further the case of *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25; [2011] 1 CLJ 51 is clear on this legal impediment against the respondent.

[36] Be that as it may and in any event, for the sake of argument, we do accept the fact that indeed there had been some performance of the agreement, the details and percentage of that performance had been outlined in paras 17–23 of the reply submission of the plaintiff's counsel which we see no necessity to repeat here. We also noted the decision of this court in *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464; [2011] 9 CLJ 257 on this issue of consideration which held in para 59 and 60 as follows:

> [59] *In our view, whether or not there has been total failure of consideration is a question of fact which can be resolved by looking at the circumstances of the case. Each case has its own peculiar facts. No two cases can be said to be identical although they may be similar*. We are inclined to take the view that minimal works such as getting development permission orders or taking most instances fall on the same side as Berjaya Time Square Sdn. Bhd (supra). This is simply because such an interpretation does not make commercial sense. What good is a mere foundation of any office building to a company? In such circumstances, it must be taken as if the promise had not been fulfilled in its entirety.
>
> [60] *In fact in Berjaya Times Square Sdn Bhd, it did not rule as wrong the conclusions in the cases which allowed termination of the respective contracts on the ground that there was failure to complete the contractual works* (see: *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 289; [1992] 1 CLJ 211; [1992] 3 CLJ Rep 666; *Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308; [1988] 1 LNS 213; *Law*

Ngei Ung & Anor v Tamansuri Sdn Bhd [1989] 2 CLJ 181; [1989] 2 CLJ Rep 44). As such the principle should therefore be this. There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there is a right to terminate the contract, but no in the latter instance. (Emphasis added.)

[37] However, in our view the factual matrix of this case have convinced us that the decisions of this court in the two above mentioned cited cases have no application to the parties herein because of again the clear intentions of the parties as evinced in the said cl 1.1 of the supplemental agreement. Further, when we read the *Berjaya Time Square*'s case and *Damansara Realty*'s case there was no mention of a like specific event agreed by the parties which triggers termination of the agreement and the remedy available upon termination of the agreements executed by the parties as spelt out in the said cl 1.1.

[38] Furthermore, it is obvious from the existence of the said cl 1.1 and the conduct of the plaintiff in refusing flat out an extension of the time prescribed thereunder that time is the essence of the contract. Therefore, as held in *Damansara Realty*'s case, quoting learned author Cheong May Fong in *Civil Remedies in Malaysia* (Sweet & Maxwell Asia, 2007) at p 38, s 56(1) of the Contracts Act 1950 applies and the contract between the parties is voidable. That being the case, the plaintiff being an innocent party has the option to terminate the contract. Section 56(1) provides:

> Section 56 Effect of failure to perform at fixed time, in contract in which time is essential.
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be of the essence of the contract.

Since in the case before us, both the agreements do not stipulate the mode of termination, we would agree with the learned judicial commissioner that the plaintiff's notice to re-enter is good enough to serve that purpose and consequentially, the said termination was lawful.

[39] To summarise, what we have decided above basically is to give effect to what the parties themselves have agreed in their agreements as to the particular event that gives rise to the right to terminate and the consequences following such termination. In this regard it is pertinent to reproduce what was held by the House of Lords in *Trollope and Colls Ltd v North West Metropolitan Regional*

Hospital Board [1973] 1 WLR 601 which was quoted by this court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464:

> *The court does not make a contract for the parties. The court will not even improve the terms which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. if the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been suitable.* An unexpressed term can be implied if and only if courts finds that the parties must have intended that term to form part of their contract. (Emphasis added.)

[40] It is with this sage advice in mind that we would not only allow the appeal with cost but also affirm the whole of decision of the learned judicial commissioner on the reliefs granted to the plaintiff. This we do even though the order proposed by the plaintiff in the original para 13(b) of its memorandum of appeal appears to be a fairer alternative but which learned counsel for the plaintiff applied on the date of hearing of the appeal to amend by deleting and substituting it with an order that the decision of the learned judicial commissioner be reinstated in toto. For the record, the said original paragraph before amendment reads as follows:

> 13. Therefore, the Appellant humbly prays that its appeal be allowed with costs here and below and that:
>
> (a) ...;
>
> (b) the orders of the HC be reinstated except for the following which ought to be disallowed/varied in the *interest of justice*:
>
> (i) prayer (d) of the Appellant's Statement of Claim be disallowed;
>
> (ii) prayer (f) of the Appellant's Statement of Claim be allowed only in respect of the first Respondent's unsold entitlement units under the said Development Agreement; and
>
> (c) such other orders be made by the FC accordingly as justice requires.

[41] What the plaintiff originally intended before the amendment is explained in its counsel written submission at para 93(b) thereof, the clarity of which is self-evident and which is why we would reproduce the same below:

> (b) the HC's judgment allowing the Plaintiff's claim and dismissing the Defendant's counterclaim be reinstated except for 3 orders which ought to be disallowed/varied in the interests of justice.
>
> These 3 orders are:
>
> (i) Prayer (d) of the Plaintiff's Statement of Claim — 'further or in the alternative, all monies received by the first Defendant from third parties from the sales of the first Defendant's entitled units be paid to the Plaintiff' — *ought to be disallowed and substituted with an order that the first*

Defendant shall be liable to complete the construction of the first Defendant's sold entitlement units and indemnify the Plaintiff against all claims from the third parties arising therefrom;

(ii) Prayer (e) of the Plaintiff's Statement of Claim — 'the Plaintiff would enter and take possession of the said land with all the improvements' — *ought to be varied to exclude the first Defendant's sold entitlement units; and*

(iii) Prayer (f) of the Plaintiff's Statement of Claim — 'declaration that the first Defendant is not entitled to the Developer's entitled units under Development Agreement' — *ought to be varied to be in respect of the first Defendant's unsold entitlement units only.* (Emphasis added.)

[42] We have decided to incorporate the above quotations with the hope (which may just be wistful thinking on our part) that in spite of our ultimate decision above, parties would still be open to explore a win-win situation for their legal predicament but which option is closed to us in view of the application of the law to the facts of this case.

[43] As a postscript to this unanimous decision of ours, we wish to add that the delivery of its summary on 26 April 2021 was done pursuant to s 78 of the Courts of Judicature Act 1964 as Azahar bin Mohamed, CJM was indisposed on the said date. This fact was made known to the parties before the said summary was read out in the Technology Court where the court proceeding was held.

Appeal allowed; leave question answered in the negative and decision of the High Court reinstated.

Reported by Ashok Kumar